

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LILLIAN MORENO and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Miami, FL

*Docket No. 02-451; Submitted on the Record;
Issued July 23, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant established her entitlement to continuing wage-loss compensation beginning May 16, 1994; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On October 26, 1993 appellant, then a 47-year-old registered nurse, was injured at work when a hospital bed rolled over her left foot. On July 27, 1994 the Office accepted the claim for the conditions of contusion right foot, chronic swelling of the left foot, fracture proximal phalanx of the forth toe and left ankle sprain. Appellant received conservative treatment including an aircast, medication and a course of physical therapy prescribed by Dr. Steven Naide, a Board-certified orthopedic surgeon. She returned to light duty in December 1993 and was approved for full duty by Dr. Naide effective May 16, 1994.

In a letter dated July 27, 1994, the Office noted the accepted conditions and indicated that compensation for wage loss had been authorized through May 14, 1994.¹ Appellant was to receive a lump-sum payment for the period April 26 through May 14, 1994. Thereafter, the Office indicated that appellant would be receiving compensation on the periodic rolls.

In an August 2, 1994 letter, the employing establishment notified the Office that it was disputing appellant's compensation benefits and submitted a copy of a CA-3 medical statement of full recovery and copies of official termination papers. It was noted that appellant had returned to full-duty work status on May 16, 1994 with the approval of Dr. Mitchell R. Pollak, a Board-certified orthopedic surgeon. The employing establishment advised that appellant had been hired under a temporary appointment not to exceed May 18, 1994; however, due to staffing shortages her appointment was extended until May 27, 1994.

¹ On May 3, 1994 appellant filed a CA-7 claim for wage loss from April 26 to May 14, 1994.

In a series of treatment notes from May through October 1994 appellant was seen by Dr. Naide's associate, Dr. Pollak, who indicated that appellant complained about continuing left ankle pain with mild overall swelling and tenderness. He ultimately referred appellant to a pain management center to rule out reflex sympathy disorder (RSD).

Appellant subsequently came under the care of Dr. J. Michael Cochran, a Board-certified neurologist. In a March 20, 1995 report, Dr. Cochran diagnosed that appellant suffered from superficial peroneal neuropathy with hypesthesia along the dorsum of the foot, common peroneal neuropathy involving slight weakness of the dorsiflexion of the foot, chronic lumbar radiculopathy at L4-5 and pain syndrome consistent with RSD.

Although Dr. Cochran considered appellant to be a good candidate for a nerve block, she was seen by Dr. Cochran over the two years and was treated only with pain medication.

In a report dated February 22, 1996, Dr. Cochran noted that appellant had been involved in a work accident in October 1993 and sustained an injury to her left foot when it was run over by a hospital bed. He discussed appellant's continuing symptoms, including severe pain, left foot parathesias and dysesthesia along the dorsum of the left foot and a left footdrop with weakness inversion of the foot. Dr. Cochran reiterated his diagnosis of common peroneal neuropathy and a lumbar radiculopathy on the left side and superficial peroneal neuropathy, "all related to this injury." He specifically stated, "[c]urrently, [appellant] has been under my care since March 20, 1995 and states that she has not been able to work since May 1994. Please afford her any consideration for assistance with employment activities that may be available for her condition."

In a November 6, 1998 report, Dr. Cochran indicated that appellant had clinical symptoms consistent with RSD due to her work injury. He noted:

"[Appellant] had a crushing-type injury involving the superficial peroneal nerve initially and also with trauma to the common peroneal nerve. At the point in time [she] had developed initially pain in the foot which progressed to pain associated with occasional edema and swelling and occasional color changes involving the same leg and with pain which would eventually come to distribute through the entire leg up to the groin."

He reported that appellant was not having any significant benefit with pain medication so he was referring her to the pain management clinic, again recommending sympathetic nerve blocks.

Appellant next came under the care of Dr. Bruce Barton, a Board-certified neurologist. In a treatment note dated October 29, 1999, Dr. Barton indicated that he was going to try appellant on a new pain medication and felt she was in need of care by a pain specialist for treatment of RSD."

On November 16, 2000 appellant filed another CA-7 claim for continuing compensation beginning May 1994.

In a letter dated December 11, 2000, the Office requested that appellant submit a rationalized medical narrative from her treating physician in order to establish her disability for work on or after May 16, 1994.

In a decision dated April 30, 2001, the Office denied appellant's claim for continuing wage-loss compensation on or after May 16, 1994 as there was no medical evidence to support disability for the period claimed on the Form CA-7.

In a June 16, 2001 letter, appellant requested a review of the written record and submitted additional evidence.

In a decision dated August 1, 2001, the Office found that appellant's request for a review of the written record as untimely filed. The Office nonetheless exercised its own discretion, reviewed appellant's request and further denied the request on the grounds that the issue of the case could equally be addressed through the reconsideration process.

A claimant seeking benefits under the Federal Employees' Compensation Act² has the burden of proof to establish the essential elements of her claim by the weight of the evidence,³ including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.⁴

The Office accepted that appellant sustained an injury in the performance of duty on December 31, 1997. Appellant must, therefore, establish that the accepted employment injury caused disability for the periods claimed. "Disability" means the incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁵ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to continuation of pay or monetary compensation for any loss of wage-earning capacity resulting from such incapacity.⁶

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a reasoned medical opinion that supports a causal connection between the claimed disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the

² 5 U.S.C. §§ 8101-8193.

³ *Nathaniel Milton*, 37 ECAB 7112 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and the cases cited therein.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁶ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987); 20 C.F.R. § 10.201.

claimant's employment injury and must explain medically how the claimed disability is related to the injury.⁷

Regarding appellant's claim for continuing wage loss, the record indicates that appellant was approved for full duty effective May 16 1994. Her employment was later terminated as her temporary contract ended with the employing establishment on May 27, 1994. Although appellant contends that she was unable to work after May 16, 1994 due to residual disability due to her work-related left foot injury, she has submitted no corroborating medical evidence to establish her disability for the period claimed. She submitted treatment notes but none of those state that she was unable to work after May 16, 1994. Dr. Cochran only related appellant's own belief that she was unable to work due to her left knee condition and specifically ask that consideration be given to appellant's condition when work was sought. He did not state that appellant was unable to work or otherwise offer an opinion on her disability status.

The Office advised appellant to submit a rationalized medical opinion to carry her burden of proof on continuing disability. Appellant has failed to submit a rationalized medical opinion to establish that she was disabled on or after May 16, 1994. Accordingly, the Office properly denied her claim for continuing wage-loss compensation.

The Board also finds that the Office properly denied appellant's request for a review of the written record.

Section 8124(b)(1) of the Act⁸ provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." Effective June 1, 1987 the Office's regulations were revised and, at 20 C.F.R. § 10.131(b), expanded section 8124(b) to provide an opportunity for "review of the written record" by an Office hearing representative in lieu of an oral hearing.⁹ With regard to a request for a review of the written record, this regulation provides: "A review of the written record must be requested in writing within 30 days of the date of issuance of the decision, specify the decision and/or issue which is the subject of the request and be made to the Office as set forth in the decision."

Appellant filed her request for a review of the written record on June 16, 2001 while the date of the Office decision was April 30, 2001. Because appellant's request was filed outside of the 30-day deadline outlined in the Act and regulations, the Office properly denied appellant's request as untimely filed. The Office also correctly noted that appellant could pursue the issues in the case through the reconsideration process.

⁷ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. § 10.131(b); *see also* 20 C.F.R. § 10.615-616; *John M. Scales*, 42 ECAB 376 (1991). This review differs from a hearing in that it does not involve oral testimony or attendance of the claimant.

The decisions of the Office of Workers' Compensation Programs dated August 1 and April 30, 2001 are hereby affirmed.

Dated, Washington, DC
July 23, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member